Center for Immigration Studies

Backgrounder

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Indefinitely Temporary

Senate Boost to High-Tech Guest Workers Will Block Green Cards

By Paul Donnelly

Very different bills have been introduced in the House and Senate to increase the H-1B Non-Immigrant Specialty Visa program. Lamar Smith (R-Texas), chair of the House immigration subcommittee, has proposed "The Technology Worker Temporary Relief Act of 2000" (H.R.3814) with support from high-tech advocates Tom Campell (R-Calif.), Chris Cannon (R-Utah), and Bob Goodlatte (R-Va.). Smith's bill simply increases the 115,000 H-1B visas authorized for FY2000 to 160,000, but would provide a range of other reforms, including requiring that employers who want to hire workers through H-1B visas have increased the number of fulltime U.S. workers, with higher wages, over the past year. The Smith bill also provides that the State Department, not the INS, would keep count of the H-1B visas, restricts H-1B visas to employers with more than $5 million in assets, and allows for expedited processing for large employers with clean records for an additional $250 fee per petition. Finally, the Smith bill requires higher fees for all H-1B petitions, which would be used for National Science Foundation scholarships, rather than Labor Department job training as now.

By contrast, the Senate's "American Competitiveness in the Twenty-First Century Act of 2000" (S.2045), could triple the annual total of high-tech guest worker visas with only minimal reforms (at best) to the permanent immigration system. The Senate bill proposes several other changes which will further lock in the shift from a U.S. admissions policy based on immigrants, to one based on guestworker visas.

The Senate bill, which was introduced by Judiciary Committee Chairman Orrin Hatch (R-Utah), immigration subcommittee Chairman Spencer Abraham (R-Mich.) and more than 20 cosponsors, has the following provisions:

1) Authorizes the following increases in H-1B specialty occupation admissions ceilings: 80,000 in FY 2000 (from 115, 000 to 195,000); 87,500 in FY 2001 (from 107,500); and 130,000 in FY 2002 (from 65,000 to 195,000).

2) Exempts nonimmigrants employed by U.S. educational institutions or research facilities and recent graduates (with master's and Ph.D. degrees) of U.S. colleges and universities from the numerical ceilings cited above.

3) Modifies the per-country ceilings so that extra employment-based visas from countries that have not used their limit could be used for visas from countries that do.

4) Allows fraudulently-issued visas that have been revoked to be re-issued, presumably to legitimate recipients this time.

5) Extends the H-1B nonimmigrant status indefinitely past the six-year expiration for those who have completed the labor certification part of the process.

6) Extends the domestic recruitment attestation requirement for H-1B dependent employers and the $500 per application fee through 2002.

7) Directs the National Science Foundation to conduct an 18-month study of the divergence in access to high technology in the United States.

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The bill's proposed increase in high-tech guest worker visas to 195,000 a year, limited to 65,000 a year just two years ago, would be ambitious enough. But analysis of the exempt categories demonstrates that this is a gross understatement of the legislation's effect.

By exempting those employed by U.S. educational institutions or research facilities and those with recent masters' or Ph.D.'s earned at U.S. colleges and universities from the 195,000 "cap" on annual H-1B admissions for three years, this legislation hugely expands this high-tech guestworker program. By how much?

In the dear-colleague letter and other materials circulated before the legislation was introduced, the bill's sponsors made no such estimate. An examination of the data suggests that the demand for these exempted H-1B visas will be at least 130,000 per year, bringing the total increase in the flow of high tech guestworkers under this legislation to 325,000 a year.

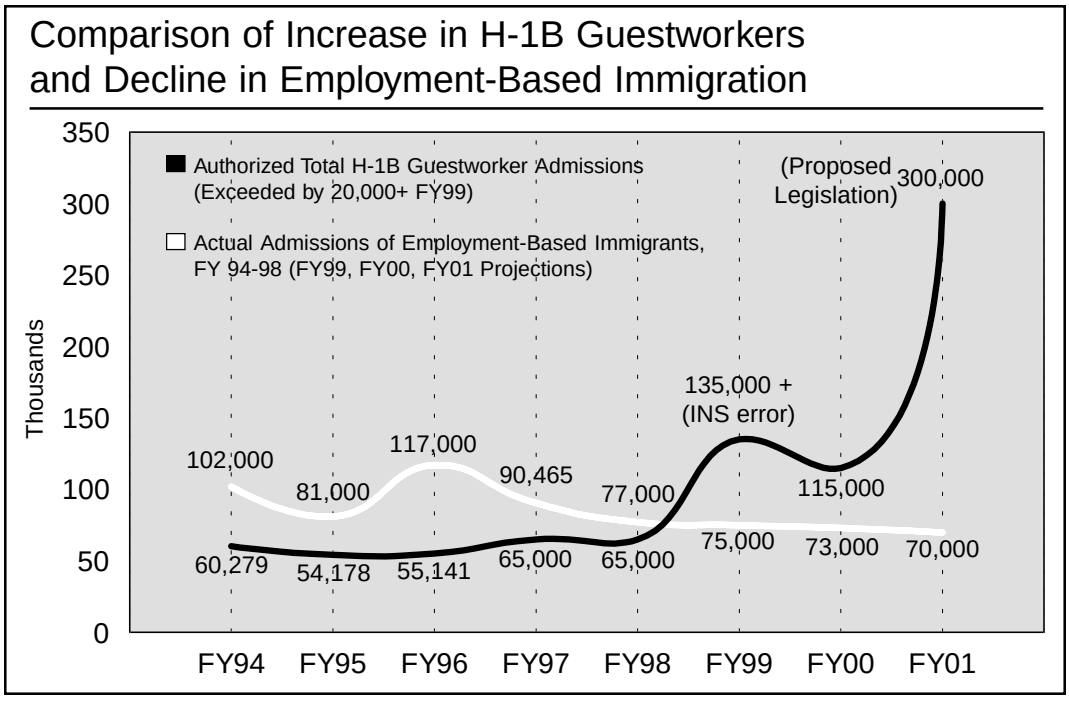
The authors of this legislation should be asked their estimate of demand for these exempted visas, and the effect which the availability of these "indefinitely temporary" visas will have on demand for such an open-ended guest worker program. Proponents of this guest worker program who argue that these workers should be admitted because of current economic conditions should be asked 1) why the legislation provides temporary visas rather than green cards, and 2) if and when economic conditions change, do they propose to expel these *temporary* workers from the United States?

What's at Stake?

The legislation's supporters have essentially claimed to make the temporary, nonimmigrant H1-B the economic equivalent of a green card: provisions to allow for H-1B workers to take better jobs at higher pay, to continue to work toward permanent residency despite changing employers, the indefinitely temporary status of allowing a guest worker whose visa has expired to remain, provided they have passed the labor certification part of the process.

The rationale for this seems to be that the INS adjustment of status backlog should not force would-be permanent immigrants to leave the country. Yet more than half of the increase in illegal immigration each year results from visa overstayers — those who entered on legal nonimmigrant visas, yet remained as permanent, illegal residents. Since there are backlogs in the family-based immigration categories measuring in the millions, this is an astonishing inequity between "economic migrants" and family reunification.

This inequity is even sharper in that it is also extended to include those who would otherwise be barred from entry because of the per-country ceilings. This proposal to waive the per-country ceiling requirements would only apply to employment-based immigrants. Yet there are hundreds of thousands of siblings of U.S. citizens — and spouses and minor children of legal permanent residents — who are facing the three-year/10-year bar for remaining illegally in the United States while waiting



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for their per-country ceiling limited visas to be awarded. The Mexican wife of a legal immigrant who is barred for 10 years because she overstayed her visa by a year — which is roughly the per-country ceiling's additional delay for her category — may well wonder why the identical provisions of the law are waived for high-tech guest workers. (Some wonder what the self-proclaimed "pro-immigrant" groups are getting out of their alliance with guest worker advocates, when this is the result.)

Immigrants on Nonimmigrant Visas?

For 20 years, two different approaches have sought to increase the number of skilled foreign workers in the United States The first, which began with the Hesburgh Commission Report in 1981 and peaked with the Immigration Act of 1990, sought to increase the numbers of permanent employment-based visas available and to make them easier to obtain, while providing protections for U.S. workers. Employers and the immigration bar had complained for many years that the number of employment-based visas available was simply too small, and that the regulatory process to obtain them took too long. In the 1990 law, the number of employment-based permanent visas was raised significantly: from 54,000 per year to 140,000 per year.

The Democratic House at the time also sought to replace the failed regulatory structure for labor certification, a necessary step for most employment-based immigrants, with a system in which a substantial investment by the employer in educating and training U.S. workers would substitute for the elaborate regulatory process. Citing concerns raised by lawyers and unions that this would not adequately protect U.S. workers, the Republican Senate rejected the proposal.

The chart on the previous page demonstrates the relationship between the declining use of the permanent employment-based visa system, and the increasing use of the nonimmigrant H1-B guest worker visas.

In 1995, the Jordan Commission on Immigration Reform proposed essentially the same reform as the House had passed five years earlier: employers willing to sign legally-binding documents attesting that they would not undercut U.S. wages and working conditions should be able to sponsor new hires for legal permanent residency simply by making a substantial investment in certified private sector education and training programs. Opponents included the newly formed American Business for Legal Immigration, the American Immigration Lawyers Association, the libertarian Cato Institute, and others who roundly condemned this "head tax" on legal immigrants and insisted that it was wrong to make employers pay for improving the U.S. workforce in order to hire skilled immigrants.

In 1998, to implement a final backroom deal with Senate Democrats and the Clinton administration, Senator Abraham and H-1B proponents agreed to a small education and training fee — to fund government-sponsored programs — as part of the temporary increase in the H-1B from 65,000 to 115,000 in 1999-2000, down to 107,500 in 2001, and back to 65,000 in FY2002.

In a dear-colleague letter asking support for the new bill, Senators Hatch and Abraham did not mention the regulatory costs to the taxpayer of labor certification (estimated by the Commission on Immigration Reform to be $60 million per year), and instead boasted their legislation "will help ensure American competitiveness and will result in substantially more money for training and scholarships for U.S. workers and students — $150 million more."

The Abraham proposal would add roughly 1 million H-1B visa holders by 2003. Even if the INS and State Department issued *all* the available 140,000 employment-based permanent immigration visas a year beginning immediately, it would be more than a decade before even these could be cleared.

In short, for 10 years the available stock of permanent employment-based visas has gone unused, while efforts to make these permanent residency visas easier to obtain through market forces have been resisted by a coalition of regulatory lawyers, professional lobbyists, and ideological libertarians. Now a proposal has been made to provide "indefinitely temporary visas" to a vastly increased level of guest workers — just short of a million in the next three years — with absolutely no way to provide them with permanent residency.

There are two reasons: First, the regulatory process for providing permanent residency to immigrants based on employment takes as much as five years, not counting the adjustment of status backlog at the INS, never mind the per-country ceiling which this legislation purports to lift.

Second, by admitting 325,000 educated guest workers each year, this bill simply overwhelms the available supply of employment-based visas, which is 140,000 annually — and of which only an average of 94,000 are

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Every country that has ever tried a guest worker program has confronted the same problem: The economics that entice guest workers to come, also lead many to stay.

used each year. In recent years, (according to the INS) the number has declined to 77,000 — barely half the total available. While proponents argue that lifting the per-country ceiling will resolve the delays in issuing employment-based green cards, and specifically cite China and India, this is shortsighted. The best estimate of the current H-1B population is roughly 500,000. Of those, perhaps half (250,000) are from China and India. So while this provision might allow all 250,000 Chinese and Indians who may be here on H-1B visas to obtain permanent residency in five years (if the Department of Labor and INS delays aren't counted), this does not count those who will come — and the hundreds of thousands who will be eligible under this bill's provisions.

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In short, the Abraham proposal is a kind of new Chinese Exclusion Act, but focused on skilled workers and to include all countries. That infamous 19th century law permitted the entry of students and merchants and, after an interval, workers, but effectively barred them from citizenship as a condition of entry. Under this proposed legislation, it will no longer be possible for a U.S. employer to sponsor a new hire for permanent residency without many years of guest worker status. With five years of permanent residency required before citizenship, this means the "best and brightest" from all over the world will be barred from U.S. citizenship for a dozen years or more.

Finally, Federal Reserve Board Chairman Alan Greenspan has been pushed into supporting a specific approach to immigration, which is unusual if not unprecedented. The Hatch/Abraham dear-colleague letter approvingly quotes an exchange with Senator James Bunning (R-Ky.) in Greenspan's recent Senate confirmation hearing: "Federal Reserve Chairman Alan Greenspan endorsed a visa increase in January 26, 2000, testimony before the Senate Banking Committee. He was asked "Do you believe we should do something with our laws — immigration — that would allow high tech . . . labor to come into the country to ease the burden as far as the problem with the labor force?" Chairman Greenspan responded: "I would certainly agree with that. It's clear that under existing circumstances . . . aggregate demand is putting very significant pressures on an ever-decreasing available supply of unemployed labor. The one obvious means that one can use to offset that is expanding the number of people we allow in, either generally or in specifically focused areas. And I do think that an appraisal of our immigration policies in this regard are really clearly on the table."

There are two layers of deception in this quote. It is unclear if Greenspan knew he was being asked about guestworkers. Secondly and significantly, Bunning was not speaking only of increased admissions of highly skilled workers.

Senator Bunning spoke of "shortages" in two labor sectors: agriculture and high tech. He did not identify the legislation he was referring to as expanding nonimmigrant visa programs, merely asking if "our laws — immigration" should be changed. Greenspan's response spoke only of "an appraisal of our immigration policies."

In another Senate Banking Committee hearing the week after the H-1B bill was introduced, when Senator Robert Bennett (R-Utah) tried to pin down Greenspan's views on immigration policy, the Fed Chairman made the point that: "It's a very, very difficult problem because while I can hold forth on the economic benefits of immigration or visas or what are implicit in an economic argument, that's not the only relevance that immigration raises. There are many, many issues — cultural questions, issues that have bedeviled the United States for a hundred years in this area." Yet Senator Phil Gramm (R-Texas), the Banking Committee chair and a key cosponsor of the H-1B bill, saw his opening, and pressed Greenspan to say that "the principle you're putting on the table" with S. 2045 was something he could "totally" support. It is still not clear if Alan Greenspan recognizes a difference between "the number of people we allow in" as guest workers or as legal permanent residents – the only category that leads to U.S. citizenship.

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Which leads to the critical question: Senators Hatch and Abraham propose temporary visas "to keep our economy vibrant" and further propose that these visas will be indefinitely temporary until these guest workers obtain legal permanent residency. Yet this legislation would bring in *three to four times* as many guest workers each year as there are permanent employment-based visas being issued. Within the span of this proposal, which extends to 2002, there will be close to 1.5 million high-tech guest workers, many on expired visas, virtually all intending permanent residency. Accordingly, this legislation intends that hundreds of thousands (if not millions) of guest workers will remain permanently beyond the expiration of their legal visas.

Every country that has ever tried a guest worker program has confronted the same problem: The economics that entice guest workers to come also lead many to stay. The United States, as the most successful multi-ethnic society in history, has resisted creating the kind of foreign underclass represented by Turks in Germany, Filipinos in Kuwait, and Chinese and Koreans in Japan.

The always-careful Mr. Greenspan took pains to say that "under existing circumstances" this "appraisal of our immigration policies" is on the table. He is being quoted as supporting temporary guest worker visas because of economic circumstances. These visas are becoming the economic — but not the social or political — equivalent of permanent residency. Because they are not permanent residency visas, and because permanent residency will not be available to hundreds of thousands of these guest workers for more than a decade after their visas expire, economic conditions may change.

This has happened in the United States before. Between 1942 and 1964, a guestworker program between the United States and Mexico brought in 4.6 million braceros. Proponents of guest worker programs, notably the late Julian Simon and Cato Institute's Stephen Moore, argue that guest workers substitute for illegal immigrants. That is, as Moore has written, an important "correlation" takes place: When guest workers go up, illegal immigration goes down.

When Moore cites evidence for this conclusion, he begins counting with 1956, and he continues until 1964, the year the bracero program was eliminated. Shortly before his 'analysis' begins, in 1953 and 1954, "Operation Wetback" deported 2 million workers who had overstayed their visas — virtually all of whom would have applied for permanent residency if it had been available. The reason for the decline in apprehensions after 1956, which Moore cites approvingly as a result of the bracero program, was actually because the Congress returned to Democratic control in 1954 and Texans Lyndon Johnson and Sam Rayburn enforced the "Texas proviso", which allowed guest workers to be exploited by their employers. Over the entire 1942-1964 bracero program, 4.6 million were admitted, and 5.3 million were deported.

It is likely that Alan Greenspan did not intend to be asked this question, but it can't be avoided: If the rationale for admitting these workers on nonimmigrant, temporary visas is purely economic, then those economic conditions may change. If they do, is Mr. Greenspan proposing that they be removed? Since, as temporary workers on expired visas, they will have no right to remain.

This factor is something H-1B visa holders are acutely conscious of, including those who are unquestionably the best. Linus Torvalds, the chief architect of the computer operating system Linux, told a House field hearing: "Coming here, we didn't know what to expect — whether we'd actually like living in the United States or not. Having been here three years I can definitely say that we've liked it a lot, and we feel this is home. But it cannot really be home as long as we might be kicked out at any time. Why are people left pending, their whole lives on hold while papers get shuffled for years without end?"

Torvalds and others are literally being alienated, as they have chosen to accept U.S. employment on the prospect of permanent residency and eventually perhaps even U.S. citizenship, which is fading in importance to the Congress even as it is being pushed into the distant future for them as individuals.

If that is not the intent of the Senate, why aren't Senators Hatch and Abraham proposing to increase *legal* immigration by a million visas in three years (for workers not for families), and have an honest immigration debate in Congress?

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Methodology

The United Engineering Foundation's Information Technology Workforce Assessment Project prepared the table below using Current Population Survey data from the U.S. Census and National Science Foundation's Scientists and Engineers Statistical Data System, or SESTAT.

Three key differences in these two estimates are 1) the CPS uses 1998 data, the NSF 1995 data; 2) the CPS definition of the IT workforce yields 2.1 million IT workers, the NSF definition 1 million, and 3) the NSF excluded those without college degrees.

The three years between 1995 and 1998 clearly explains some of the growth in the IT workforce reflected in the 1 million counted by NSF in 1995, and the 2.1 million counted by the CPS in 1998. The NSF figure is also an underestimate, since many workers (such as Microsoft's chief software architect Bill Gates) do not have college degrees, and so were not counted by NSF. The CPS study shows that 29 percent of the U.S.-born IT workforce in 1998 did not have college degrees, which tends to undercut the argument of the IT industry of the value of such qualifications for IT work.

Analyzing the CPS data, of the 2.1 million IT workforce, 349,000 are immigrants, mostly naturalized U.S. citizens. Of the 349,000, 40 percent (140,000) have masters' degrees or higher. Of the total 349,000 immigrant IT workers in 1998, 25 percent had arrived since 1992. Given the already-egregious delays in the green card process, virtually all of these workers would still have been on their guest worker visas in 1998. Assuming that the same proportion (40 percent) of these H-1B visa holders have masters' degrees or higher as of the immigrant IT workforce as a whole, that yields roughly 35,000 masters' degree or higher H-1B visa holders now working in the IT industry — all of whom would have been exempted from the H-1B caps in their year of admission under this legislation.

Of course, there are three reasons why that total does not help assess the increased demand for guest worker visas that will result from the exemptions for research and education and those with graduate degrees, even though the CPS data yields an estimate of 35,000. First, it counts only those who are already here, not the flow of entries. Second, it only counts the IT industry which, as IT employer groups like the ITAA and ACIP like to remind Congress, H-1Bs are not exclusively employed in the IT industry. Third, it does not measure demand where it is most likely to increase — where foreign students graduate and seek employment, either with schools and research organizations or, after obtaining a graduate degree, anywhere.

The NSF's 1995 data sheds light on those specifics. While 1995 was well before the enormous increase in the H-1B program in recent years, the NSF was only studying IT workers with college degrees or higher. Interestingly, while the NSF method would have excluded the more than one-third of the U.S.-born CPS-counted IT workforce that had less than a college degree, both studies counted almost exactly the same percentage of

Education of Persons with Core IT Jobs by Nativity and Citizenship Status[1] (Percent)

	1998[2]		1995[3]				
Degrees Completed	**Native-Born**	**Foreign-Born**	**Native-Born**	**All Foreign-Born**	**Naturalized Citizens**	**Perm. Residents**	**Temp. Residents**
High School	7	4	-	-	-	-	-
Assoc./Voc.	29	11	-	-	-	-	-
Bachelor's	48	45	75	51	61	40	21
Master's +	15	40	25	49	39	60	79
All IT Workers	100	100	100	100	100	100	100

[1]SESAT data are collected only for Bachelor's or higher-level college graduates and exclude many programmers, so they measure more educated workers.
[2]Current Population Survey data.
[3]NSF SESAT data.

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the IT workforce as immigrants, roughly 17 percent, despite doubling the sample and other changes in definition.

According to the NSF data, of the 176,000 IT workers who were foreign-born in 1995, 79 percent of those on temporary visas had masters' degrees or higher.

Three things should be clear about that proportion. First, the NSF count of temporary visas includes both F and H-1B visa categories. Second, the 1995 data reflected a different situation not only in the U.S. economy, but also in the ratio of high tech guest worker visas issued with permanent, employment-based immigration. Third, there are substantially more foreign students now, and a higher percentage are from countries (such as India and China) which have specific obstacles to permanent residency, including the per-country ceilings which this H-1B increase proposes to lift.

It should also be clear that all the factors which have changed since this 1995 estimate have tended to increase, not decrease the likely demand of these graduates for the opportunity to remain in the United States, on whatever visa category is available to them that will allow them to work.

Excepting only the small number of foreign students at U.S. schools who marry U.S. citizens, and the infinitesimal percentage who would win the visa lottery, the prolonged delay in employment-based immigration means that temporary visas are the only way in which these individuals would be able to stay and work. Moreover, as has been documented many times, notably in "Green Card Blues" in the January 10, 2000, issue of *TechWeek*, many high tech guest workers agree to accept the temporary visa intending to obtain a sponsor for permanent immigration. Surely this motivation will not decrease when a vastly increased opportunity to remain is opened.

If the proportion of 79 percent of IT workers on temporary visas who had graduate degrees in 1995 is applied to the permanent level of 65,000 H-1B visas authorized by the 1990 Act, that yields 51,000 visas in that total that would be exempt, under this new proposal. Likewise, if the 79 percent is applied to the 115,000 H-1B visas authorized for this fiscal year, that would yield an additional 90,000. But this proposed legislation would not only increase the ostensible H-1B cap to 195,000 a year, it would exempt students who were hired by schools and research facilities, and those with graduate degrees. Applying that 79 percent proportion to the increased total would yield 154,000. Adding the exempt category admissions from this rough estimate of demand to the original increase would result in 350,000 high tech guest worker admissions per year.

While conservative in assuming no shift in demand toward these essentially unlimited visas, this estimate still probably over-relies on the 1995 NSF data and the 79 percent of IT workers on temporary visas with masters' degrees which the NSF data demonstrates. For one thing, comparing the educational achievement characteristics of IT workers on temporary visas in 1995 to the available level of guest workers visas in 2000 does not prove how the current and near-future population of foreign students in U.S. colleges and universities will respond. But this legislation does make clear its intent to provide very large increases in guest worker visas, and to make them much easier to obtain.

According to the Institute for International Education's *Open Doors* report, there are 490,000 foreign students in the United States, of whom roughly half are in graduate programs. That is, there is a population approaching 250,000 which could qualify for the categories exempted from the guest worker 'caps' proposed in this legislation. Moreover, the absolute numbers for foreign students in the U.S., the percentage in particular high-tech fields, and the proportion that are from countries and regions (such as China and India) which have severely backlogged immigration categories have all been growing rapidly.

Accordingly, a reliable estimate of the increased demand for the H-1B visa program as a result of the explicit increase and the even larger implicit one would examine the size of the eligible population, the behavior of a similar population in the past, and discount for other changes which would tend to add or subtract as the dynamic changes. The eligible population is in the range of 250,000 foreign students in graduate programs today. In the past, as much as 79 percent of IT workers alone who had temporary visas, also had graduate degrees. Discounting for minor changes (such as the growth in the Indian software industry, and the increasing distance from the Tiananmen Square massacre in China) would result in only minor reductions in demand for these visas, hence (somewhat arbitrarily) this estimate is based on 67percent rather than 80 percent: a total of 325,000 a year. This may be low — but it is surely not too high.

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This *Backgrounder* examines the impact these bills could have on immigration policy ans on the lives of immigrants themselves.